



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

# LEGAL BUREAU BULLETIN

---

Vol. 47, No. 6

November 2017

---

- I. SUBJECT:** CIVIL LIABILITY FOR ON-DUTY AND OFF-DUTY ACTION
- II. QUESTION:** UNDER WHAT CIRCUMSTANCES WILL A MEMBER OF THE SERVICE BE ENTITLED TO REPRESENTATION BY THE OFFICE OF THE CORPORATION COUNSEL AND INDEMNIFICATION BY THE CITY OF NEW YORK IN CONNECTION WITH A CIVIL SUIT STEMMING FROM ON-DUTY OR OFF-DUTY ACTION?
- III. ANSWER:** A MEMBER OF THE SERVICE IS ENTITLED TO REPRESENTATION AND INDEMNIFICATION BY THE CITY PROVIDED THAT: (1) THE CONDUCT AT ISSUE INVOLVED THE OFFICER'S PROPER PERFORMANCE OF HIS OR HER DUTIES AND (2) THE OFFICER COMPLIED WITH CERTAIN ADMINISTRATIVE REQUIREMENTS.

**IV. DISCUSSION:**

**A. Introduction**

Historically, civil lawsuits brought against uniformed members of the service and the City of New York involve allegations of false arrest, illegal search, use of excessive force, malicious prosecution, and fabrication of evidence. Civil litigation may also arise from actions or omissions by officers that do not involve arrest situations or other law enforcement activity, such as motor vehicle accidents or allegations of employment discrimination.

In light of the possibility that actions by an officer may result in civil liability, this Legal Bureau Bulletin:

- Explains that officers are entitled to representation and indemnification by the City of New York provided that the officer properly performed his or her duties,
- Provides an overview of these administrative requirements with which officers must comply to be entitled to representation and indemnification, and
- Advises officers of the intradepartmental resources available to officers who are named as defendants.

## B. Definitions

In the context of civil suits brought against officers, the following terms are defined accordingly:

- **Representation:** When the Office of the Corporation Counsel serves as an officer's attorney in a case where the police officer is named as a defendant.
- **Indemnification:** When the City of New York incurs the cost of an officer's representation or any monetary verdict, judgment, or settlement.
- **Default judgment:** When a court, upon the motion of a plaintiff's attorney, finds an officer liable because he or she failed to respond to lawsuit papers.

## C. Overview of Law Governing Civil Suits Against Members of the Service

New York General Municipal Law § 50-k (hereinafter “§ 50-k”) governs the circumstances under which an officer is entitled to representation and indemnification by the City of New York for acts arising from the performance of his or her official duties. Under 50-k, the Law Department (the “Corporation Counsel”) is the agency which makes representation decisions, and they do so on a case-by-case basis. Their decision will stand unless it can be established that the decision is arbitrary and capricious.

In summary, § 50-k provides that the Corporation Counsel will represent officers who are sued civilly and that any resulting judgment or settlement will be paid by the City provided that:

- The conduct at issue involved the proper performance of the officer's duties and
- The officer complied with certain administrative requirements set forth in § 50-k.

Each of these requirements is discussed more fully below:

### 1. Requirement that Conduct Involve Proper Performance of an Officer's Duties

For the purposes of § 50-k, an officer acted in the proper performance of his or her duties where he or she:

- Was acting within the scope of his or her employment;

- Was not in violation of any law or NYPD rule or regulation at the time the alleged act causing damages occurred; and
- Any injuries or damages were not the result of intentional wrongdoing or recklessness on the part of the officer.

Each of these requirements is addressed in turn:

#### **a. Scope of Employment**

An officer's actions fall within the scope of his or her employment where the purpose of his or her actions is to further the Department's interests or to carry out his or her duties required by the Department. Thus, officers are generally acting within the scope of their employment when making on-duty arrests, and also off-duty arrests for non-minor offenses. For example, an officer is acting within the scope of his employment where, while on-duty, he uses reasonable force to effect the arrest of an individual who is seen evading the subway fare.

On the other hand, an officer's actions do not fall within the scope of his or her employment in the following circumstances:

##### **1. When the Incident Underlying the Arrest is a Personal Matter**

An officer will not be represented and/or indemnified where the conduct at issue involves a matter that is "wholly personal in nature."<sup>1</sup> Family disputes, personal traffic disputes, and disputes with neighbors are all examples of matters that are personal in nature.

For instance, a court held that an officer was not acting within the scope of his employment for the purposes of § 50-k where the altercation underlying the assault claim against the officer was brought on by a traffic dispute that occurred while the officer was off duty and on vacation.<sup>2</sup>

##### **2. When the Incident Occurred While Engaging in Secondary Employment**

An officer's off-duty actions while engaging in secondary employment will most often be taken in furtherance of the officer's private employer, rather than the City of New York. Accordingly, an officer who takes action off-duty while engaging in secondary employment will most likely not be represented and/or indemnified by the City.<sup>3</sup>

Officers should also note that the mere fact that an officer identified himself as a police officer during an incident does not necessarily mean that an officer's actions were taken within the scope of his or her employment.<sup>4</sup> Additionally, in cases involving an officer's use of a firearm, the use of the officer's firearm, by itself, is insufficient to establish that the officer's actions fell within

<sup>1</sup> Longin v. Kelly, 875 F. Supp. 196 (S.D.N.Y. 1995).

<sup>2</sup> Weitman v. City of New York, 222 A.D.2d 316 (N.Y. App. Div. 1<sup>st</sup> Dep't 1995).

<sup>3</sup> Note that secondary employment is distinct from the Paid Detail Program. Officers assigned to the Paid Detail Program will likely be entitled to representation and indemnification by either the City or the employer pursuant to the Department's Paid Detail Agreements.

<sup>4</sup> Longin, 875 F. Supp. at 203, n. 6 (holding that the fact that the officer "represented himself as a police officer [in the course of the alleged incident] does not disturb [the court's] conclusion that he acted outside of the scope of his employment").

the scope of his or her employment.<sup>5</sup> Further, officers will not be protected from actions unrelated to police duties by virtue of the fact that the actions were taken while on duty.

**b. No Violation of the Law or NYPD Rules or Regulations**

The City may not represent or indemnify officers where the officer's conduct at issue, either in whole or in part, violated the law or a Department rule or regulation. Accordingly, officers who are disciplined as a result of the conduct that forms the basis of a civil action are not entitled to representation by the Corporation Counsel or indemnification by the City. The following are examples of actions that may preclude representation and indemnification:

- A guilty finding at a Department Trial;
- The issuance of Charges and Specifications;
- A substantiated allegation by the Internal Affairs Bureau;
- A Command Discipline; or
- A substantiated allegation by the Civilian Complaint Review Board.

In those cases where there are open investigations into whether a police officer acted contrary to law or NYPD policy, the Law Department will consult with the investigative body and review all available materials to assess the likelihood that a conflict will arise if it undertakes representation of the officer. If the Law Department determines that a conflict is unlikely, it will undertake full representation of the officer. If the attorneys feel they are unable to make such an assessment to a reasonable degree of certainty, the City will pay for counsel to represent that officer until and unless the officer is formally charged with engaging in conduct in violation of law or NYPD policy.

**c. No Intentional Wrongdoing or Reckless Conduct**

Section 50-k(5) provides that an officer's intentional or reckless conduct bars indemnification by the City.<sup>6</sup> For instance, the Southern District held that the City's refusal to indemnify an officer was justified where the officer severely injured a juvenile by throwing a radio at his head in order to apprehend him, and thereafter failed to afford the juvenile any medical treatment, or otherwise inform any Department personnel that the juvenile needed medical treatment.<sup>7</sup>

---

<sup>5</sup> *Id.* at 202.

<sup>6</sup> N.Y. GEN. MUN. LAW § 50-k(5).

<sup>7</sup> *Banks v. Yokemick*, 214 F. Supp. 2d 401 (S.D.N.Y. 2002) ("Considered as a whole, these circumstances all sufficiently support a reasonable finding that [the officer's] actions crossed the threshold into conduct that would qualify as intentional or reckless.").

## **2. Administrative Requirements**

Officers must comply with the following administrative requirements to be entitled to representation and indemnification by the City:

- Meet the terms of Patrol Guide Procedure No. 211-21 (“P.G. 211-21”); and
- Fully cooperate with the Corporation Counsel.

The details of these requirements are as follows:

### **a. Compliance with P.G. 211-21**

P.G. 211-21 provides the procedure for when an officer is served with a summons and complaint or otherwise becomes aware that he or she is a defendant in a civil lawsuit.<sup>8</sup> Generally, P.G. 211-21 requires that if an officer or someone at his or her command is served with legal papers in which the officer is named as a defendant in a lawsuit, he or she must deliver the legal papers and a Request for Legal Assistance to his or her Commanding Officer immediately to receive representation by the Corporation Counsel. The Commanding Officer will, in turn, ensure that the legal papers are processed and delivered to the Legal Bureau for forwarding to the Corporation Counsel within ten days, as required by § 50-k(4). Note that failure to complete and forward a Request for Legal Assistance in a timely manner may result in a default judgment being entered against the officer who is named in the lawsuit.

### **b. Cooperation with the Corporation Counsel**

After the Corporation Counsel determines that it may represent an officer, the officer must then fully cooperate with the Corporation Counsel in preparing a defense in order to be entitled to continued representation. Note that an officer’s duty to cooperate with the Corporation Counsel continues after retirement. Such cooperation requires that the officer do, at minimum, the following:

- Provide a reasonable means of communication (including, but not limited to, a Department cell phone number and a Department e-mail address);
- Return phone calls and e-mails to the Assistant Corporation Counsel (“ACC”) assigned to the defense of the case;
- Appear promptly and prepared when requested for interviews, deposition preparation, trial preparation, court appearances, depositions, and other important meetings;
- Comply with P.G. 211-17 regarding the production of documents; and
- Answer the ACC’s questions completely and accurately.

---

<sup>8</sup> This Bulletin provides a general overview of the requirements of P.G. 211-21. For a more comprehensive understanding of the requirements of P.G. 211-21, it is recommended that officers refer to the procedure itself.

Note that if an officer fails or refuses to cooperate with the ACC, the Corporation Counsel has a statutory right to withdraw representation. Thus, if an officer does not cooperate with the ACC, the officer may need to find alternative legal representation.

### **3. Resources Available to Officers Named in Civil Suits**

The Department offers many resources to officers who are named as defendants in civil suits. The Department recently formed the Police Action Litigation Section (“PALS”) within the Legal Bureau. PALS consists of civilian and uniformed MOS, including attorneys, who are tasked with assisting members of the service and the Corporation Counsel’s Office with all aspects of civil litigation, including collecting documents, coordinating scheduling between officers and the Corporation Counsel, conducting legal research, and informing officers of the status of civil suits. Officers are encouraged to contact PALS with any questions or concerns about anticipated, pending, and resolved civil suits at (646) 610-5455. Additionally, regardless of whether the Corporation Counsel represents an officer, the officer may always consult with his or her union or other private counsel.

## **V. CONCLUSION**

Officers are entitled to representation and indemnification by the City of New York provided that the officer’s conduct involved the proper performance of his or her duties and that the officer complied with the administrative requirements described above. Any questions regarding civil liability should be addressed to PALS either by telephone at (646) 610-5455 or in writing to the Commanding Officer, Legal Bureau.

This bulletin was prepared by  
Katherine Byrns, Agency Attorney, Legal Bureau

**Legal Bureau Bulletin Vol. 17, No. 2 is revoked.**